**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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| STATE OF WASHINGTON, | ) | No. 62121-1-I |
| Appellant, | ) | |
| | ) | |
| v. | ) | UNPUBLISHED OPINION |
| | ) | |
| TEENA MARKUSEN, | ) | |
| | ) | |
| Respondent. | ) | FILED: September 28, 2009 |
| | ) | |

Schindler, C.J. — Any fact that results in more serious punishment for the charged crime must be alleged in the information and proved beyond a reasonable doubt. Teena Markusen contends that after State v. Williams, 162 Wn. 2d 177, 170 P.3d 30 (2007), it is error to refer in jury instructions to the underlying offense in a prosecution for bail jumping. But as explained in State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006), cited with approval in Williams, the underlying offense must be established to determine the applicable statutory maximum. Accordingly, the trial court did not err in its instructions and Markusen's counsel did not provide ineffective assistance in failing to request a limiting instruction restricting the jury's use of the limited evidence provided about the underlying offense, which the jury was told had been dismissed. Markusen also

argues that one of her two convictions for bail jumping must be reversed because she was denied her constitutional right to present the affirmative defense that uncontrollable circumstances prevented her from appearing in court. But her offer of proof contained no evidence establishing that statutory defense. We affirm.

FACTS

On May 4, 2007, Markusen was arrested for unlawful possession of methamphetamine. She was charged and released with a requirement to appear in court for trial on November 5. She failed to appear on that date and a warrant issued for her arrest. A few days later Markusen reappeared in court and the warrant was quashed.

The State filed a count of bail jumping under another cause number for the missed November court date. Markusen was arraigned on the new charge in February and was released upon her promise to appear for a pretrial hearing on May 7, 2008. Markusen failed to appear on that date. The State charged Markusen with a second count of bail jumping.

For reasons not explained in the record, the possession charge was ultimately dismissed without prejudice.

When the parties appeared for trial on the two counts of bail jumping, the State brought a motion to exclude evidence that the controlled substance charge had been dismissed, even though it maintained that the identification of that charge had to be included in the jury instructions. Defense counsel responded partly by

moving to "sanitize" the nature of the underlying charge. Counsel agreed that the jury was probably required to make some finding about the underlying charge, but was particularly concerned that her client would be prejudiced by any association with methamphetamine because of media attention focusing on that drug.

The court ruled that the instructions would refer to the initial charge as possession of a controlled substance as a class C felony without specifying the precise controlled substance. But the court allowed the defense to present evidence that the charge had been dismissed, and ruled that the jury would be instructed that the fact of the dismissal was not a factor to be considered in determining guilt or innocence.

Just before the trial began, the defense identified a witness to support the statutory affirmative defense that uncontrollable circumstances prevented Markusen from appearing for the November 5, 2007 trial date. As an offer of proof, counsel stated that the witness would testify that sometime early in the month of November he had gone to Ms. Markusen's home and found her so ill that he called Markusen's son to take her to the doctor or the hospital. Counsel conceded that the witness could not pinpoint the date, but indicated that Markusen would testify that it was either on the date of the missed court hearing or during the dates just prior to the missed date. Counsel acknowledged that she had no medical records or other documentary evidence to establish the date of the illness or any other information about Markusen's illness or treatment.

The State argued that the proffered defense evidence was insufficient to establish the affirmative defense and therefore moved to exclude it. When the court pressed counsel for more details about what her client's testimony would be, counsel indicated that she did not know the nature of the illness or the treatment, but her recollection of her conversation with her client was that the day the witness had seen Markusen was the day before the court date, and that either because of the lateness of the medical visit that night or because of the prescribed medication, her client overslept the time for the court date the next day.

The court ruled that, based on what counsel had provided at that point, the evidence was not relevant because it could not establish the statutory defense as a matter of law. Markusen did not raise the issue again during trial and did not testify.

Markusen was convicted by the jury of both counts and received a standard range sentence.

Markusen appeals.

## ANALYSIS

### The "To Convict" Instruction

Markusen contends that the "to-convict" jury instruction relating to the November 7 missed court date was erroneous because it required the jury to make a finding that she had been charged with an underlying controlled substances offense. She argues that although case law previously required such a finding,[1]

[1] See, e.g., 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 120.41 (2d

after the 2007 decision of our supreme court in Williams, 162 Wn.2d at 177, a jury now should neither be required nor permitted to make any finding regarding the underlying offense. We disagree.

RCW 9A.76.170 both defines bail jumping and sets forth its penalties:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
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> . . . .
>
> (3) Bail jumping is:
>
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;
>
> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
>
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
>
> (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

In Williams, our Supreme Court addressed a claim that the charging documents and jury instructions in a bail jumping case were inadequate because the underlying charge was identified in the information and to-convict instruction only as a possession of a controlled substance without reference to that charge's penalty classification.

In affirming the conviction, the Williams court addressed a disagreement between the divisions of this court about the necessity of specifically pleading and

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ed.1994).

proving the penalty class of the underlying offense. Division Two of this court had held in State v. Ibsen, 98 Wn. App. 214, 217, 989 P.2d 1184 (1999), that the penalty classification of the underlying crime was an essential element of the charge, while Division One had upheld a conviction in State v. Gonzalez-Lopez, 132 Wn. App. 622, 132 P.3d 1128 (2006), in which only the title of the underlying offense was specified. The Williams court agreed with the analysis in Gonzalez-Lopez and rejected Ibsen. Williams, 162 Wn. 2d at 184.

Markusen acknowledges that the opinion in Williams seemingly approves the type of instruction used in this case when it states that for a proper to-convict instruction "a simple identification of the underlying charge is sufficient." Williams, 162 Wn. 2d at 187. She nonetheless contends that this language should be disregarded because "one can logically deduce" from the reasoning in Williams that reversal is required when the jury instruction includes such a reference. According to Markusen, because Williams held that the elements of the crime of bail jumping are all contained in section one of the statutes, there is no need for the State to plead or prove anything regarding the penalty classification in section three and it is indeed prejudicial to do so. We disagree.

The court in Gonzalez-Lopez held that a plain reading of the statute shows that section one defines the elements of the crime for purposes of determining guilt of the offense of bail jumping. Gonzalez-Lopez, 132 Wn. App. at 629. However, citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435

(2000) and State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), Gonzalez-Lopez also held that the charging document in a bail jumping case must also set forth sufficient information about the underlying offense to establish the applicable statutory maximum punishment. Gonzalez-Lopez, 132 Wn. App. at 632. For the same reason, it is clear that, absent a stipulation, the jury must make a finding regarding the underlying offense in a bail jumping case to support imposition of a conviction and sentence for any level greater than the base misdemeanor sanction. See Apprendi, 530 U.S., at 494, n.19, 120 S.Ct. 2348 (facts necessary to increase a sentence are "the functional equivalent of an element of a greater offense" for purposes of the right to a jury trial). We conclude the instruction employed by the court was not erroneous.

Ineffective Assistance for Failing to Request a Limiting Instruction

Markusen also contends that her attorney should have requested an instruction limiting the jury's use of the dismissed drug charge. However, as Markusen acknowledges, effective counsel generally may choose not to request a limiting instruction as a matter of reasonable tactics. See, State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

Contrary to Markusen's position on appeal, her trial counsel correctly acknowledged that, consistent with Williams and Gonzalez-Lopez, basic information regarding the underlying offense was necessary in the jury instructions.

Given that counsel's understanding of the law regarding that necessity was correct, that the trial court agreed with counsel's request to remove the specific reference to the drug methamphetamine, and that the jury also learned the underlying charge was dismissed, we do not find that Markusen has established either of the necessary components of an ineffective assistance claim of deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Uncontrollable Circumstances Defense

Markusen next contends that she was denied her constitutional right to present the affirmative defense of uncontrollable circumstances under RCW 9A.76.170 (2) when the trial court excluded her proffered evidence regarding the reasons for her November 7, 2008 failure to appear for trial. We disagree.

A criminal defendant has a constitutional right to present a defense "consisting of relevant evidence that is not otherwise inadmissible." State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). But a defendant "'has no constitutional right to have irrelevant evidence admitted in his or her defense.'" Thomas, 150 Wn.2d at 857, (quoting State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). "The trial court has broad discretion regarding the admission or exclusion of evidence, and the trial court's decision will not be reversed absent a manifest abuse of discretion." State v. Mee Hui Kim, 134 Wn. App. 27, 139 P.3d 354 (2006), citing State v. Swan, 114

Wn.2d 613, 658, 790 P.2d 610 (1990). A court abuses its discretion if its decision rests on untenable or manifestly unreasonable grounds. State v. Martinez-Lazo, 100 Wn. App. 869, 872, 999 P.2d 1275 (2000).

"Uncontrollable circumstances" is an affirmative defense to the charge of bail jumping. RCW 9A.76.170 (2) provides:

> It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.010(4) further defines "uncontrollable circumstances" as

> an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

The trial court found that the problem with Markusen's proffered evidence was that it ultimately established no more than that she overslept on the day of her court hearing, which, even if it was somehow the result of her treatment or illness the day before, was not as "a medical condition that requires immediate hospitalization or treatment." We conclude the trial court did not err in reaching this conclusion.

From the record, it appears that neither Markusen nor her proposed witness were even certain of the date of her illness and treatment. Accepting her counsel's

last version of the offer of proof – that Markusen became ill and was treated the day before the hearing – as the definitive version, counsel still could identify no particular illness and could provide no description of the treatment received. Although counsel speculated that the unknown medicine Markusen received caused her to oversleep, counsel also acknowledged that it was perhaps merely the lateness of the hour of her treatment the night before, yet another fact for which counsel could provide no specific information. Finally, counsel offered nothing to explain why Markusen was prevented by her condition from turning herself in late on the scheduled trial date or even on the day after, which would be required to establish the necessary element of the statutory defense that Markusen had appeared or surrendered as soon as the uncontrollable circumstances ceased to exist. A defendant raising an affirmative defense must offer admissible evidence to justify an instruction on the defense. State v. Janes, 121 Wn.2d 220, 236-37, 850 P.2d 495 (1993). Markusen did not do so here. Because she did not identify a relevant purpose for the evidence, the court did not err in excluding it.

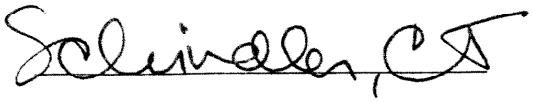
For the first time on appeal Markusen also contends that the evidence should have been admitted to rebut the element of knowledge, which had been included in the jury instructions and therefore functioned as an element the State was required to prove.[2] She argues that we should therefore reverse the trial court even though this argument is being raised for the first time on appeal because the

[2] Absent such an instruction, the statute requires only that the State proves the defendant was given notice of the required court dates. State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004).

violation of her right to present a defense presents a "manifest error affecting a constitutional right." RAP 2.5(a). To show that a claimed error is manifest, however, the trial court record must be sufficiently developed to show actual prejudice. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The offer of proof and the trial court's detailed questioning focused entirely on the statutory defense. The record is not sufficiently developed for us to consider Markusen's new argument.

Alternatively, Markusen contends her trial counsel provided ineffective assistance by failing to argue the proffered evidence was admissible to controvert the State's proof of the knowledge element in the jury instructions. But the adequacy of counsel's performance is determined by considering the entire record in the trial court. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). The record includes a letter Markusen sent the sentencing judge, which strongly suggests she would not have testified consistently with the offer of proof.[3] Counsel therefore could reasonably have declined to present such an argument as a matter of legitimate strategy, which is a choice that cannot form the basis for a claim of ineffective assistance. Townsend, 142 Wn. 2d at 847.

We affirm.



[3] In the letter, Markusen told the trial judge that she first became ill on November 5, not the day before, and she did not claim to have received any medical attention for the illness until several weeks later.

WE CONCUR:

Dwyer, A.C.J.